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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1961.

NO. 471

JOHN J. BURKE, JR.,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the First Circuit

SOLOMON SANDLER,
63 Rogers Street,
Gloucester, Massachusetts,
Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1961.

NO.....

JOHN J. BURKE. JR.,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the First Circuit

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above cause on August 10, 1961.

OPINION BELOW

The opinion of the Court of Appeals is printed and appended herein (infra, p. 17), but has not as yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1961 (infra, p. 23). Motion for rehearing was denied on September 7, 1961 (infra, p. 24). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Are payments made by corporations for taxes and interest for the benefit of a taxpayer of which corporations he was manager, a major stockholder, and in financial control, proper deductions which may be claimed on the stockholder's individual income tax return?

2. May a taxpayer claim as a deduction on his individual income tax return the loss resulting when an assignment of corporations, of which the taxpayer is a major stockholder, is made to a trustee for the benefit of creditors during the taxable year?

3. Are moneys paid to an individual income tax payer's estranged wife and personal creditors by corporations managed and financially controlled by him as a major stockholder, "income" or "return of capital" where the corporations were assigned to a trustee for the benefit of creditors during the taxable period when the payments were made?

4. Is an incorrect tax return a false and fraudulent tax return because the taxpayer has failed to report items of income if he believes that he has enough allowable deductions to offset the unreported income?

5. Should a defendant in a criminal case have to make a choice between the witnesses he should call in his defense, to the extent of the availability of his funds, or should the government provide funds to the defendant so that he may subpoena any witness he deems necessary for his defense?

6. Did the District Court err in allowing the defendant to act as his own attorney by giving him "wide latitude in the presentation of his case" when it was apparent that the defendant did not know how to present his case nor how to protect himself during the presentation of his case?

STATUTES INVOLVED

Internal Revenue Code (1939), Section 145 (b):

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or payment thereof, shall . . . be guilty of a felony."

Internal Revenue Code (1954), Section 7201:

> This is the same as Section 145 (b) above.

Internal Revenue Code (1954), Section 161:

> "There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness."

STATEMENT

Defendant-Petitioner, John J. Burke, Jr., was found guilty by a jury on four counts of an indictment charging him with willfully and knowingly attempting to evade a large part of the income tax due by filing false and fraudulent income tax returns.

Counts one to four alleged willful evasion of taxes owing for the calendar years 1952 - 1955 respectively. (TT3)

The petitioner is an attorney but practiced law only from 1934 to 1937. In 1960, at the trial of this

case in which he was defendant, he acted as his own attorney. From 1937 to 1960, he was engaged in the operation of fishing vessels and related businesses.

In 1950, the petitioner acquired ownership and management control of several fishing vessels, some corporate and others not corporate. (TT 767, 790)[1]

Late in 1951, the Internal Revenue Service at Boston notified the petitioner that the service had placed liens in amount of about $200,000 for unpaid withholding taxes incurred by prior owners on two of the aforementioned vessels, in name, "Hilda Garston", presently owned by Hilda Garston, Inc., the capital stock of which was owned by the petitioner, and the "Florence and Lee", presently owned by Florence & Lee, Inc., the capital stock of which was owned by the petitioner. (TT 376, 648, 767)

On January 1, 1952, the petitioner's financial ownership was as follows: (TT 764)

1. Cape Ann Machine Co., Inc. — 20% owner but management control of the stock.
2. Sherman B. Ruth, Inc. — 50% owner but management control of the majority of the stock.
3. B & B Trawling Co. — 50% owner but management control of the majority of the stock.
4. Hilda Garston, Inc. — 100% owner.
5. Florence & Lee, Inc. — 100% owner.
6. Burke Oil Transport — Truck — 100% owner.
7. Curley Esso Station — 100% owner.
8. Hesperus Diner — 50% owner.
9. Owned several other fishing vessels.
10. 40 shares of Gloucester Safe Deposit & Trust Company shares at $40 — acquired in 1941.
11. U. S. Government Bonds — $5500 acquired since 1940.

[1]TT refers to Trial Transcript

12. Dwelling in Gloucester, Massachusetts.
Mortgage on January 1, 1952 $25,842.12
Cost of dwelling in 1947 in excess of $50,000.

13. Cash — $14,000.

The petitioner's 1952 and 1953 income tax returns were filed on March 15, 1954.

In April 1954, an assignment for the benefit of creditors was made of the above named corporate and non-corporate entities. (TT 356, 784)

At this time, the petitioner was wiped out. He had now lost the boats, cash, stock in the above corporations, the diner, the gas station, and his home. (TT 760)

In 1951, the petitioner caused some of the vessel corporations to borrow large sums of money from banking institutions. The notes, secured by preferred vessel mortgages, were endorsed by the petitioner.

In 1952, the Internal Revenue Service at Boston, acting by and through Thomas Scanlon, District Director, agreed with the petitioner that the aforementioned back taxes were to be paid from funds of any or all of the entities owned or managed by the petitioner, regardless of whether the individual entity owed the taxes and that the petitioner was to consider the whole operation as one large entity rather than several small ones. (TT 768 - 771)

The end result of this was to make the financial position of the entities impossible and in April 1954, the aforementioned assignment for the benefit of creditors was made.

In the taxable years in question, tax and interest payments were made by some of the aforementioned corporations for the benefit of the petitioner.

Also in the taxable years in question, payments were made by some of the corporations to petitioner's estranged wife and for his personal expense.

In November 1956, Internal Revenue Service acquired possession of the records of the aforementioned entities by seizure. The Service stated that the records of the incorporated vessels Hilda Garston and Florence & Lee were not available even though the defendant said they were. The records seized were in possession of the assignee for the benefit of creditors aforementioned. No summons was ever served on the petitioner to produce any records including his personal ones. (TT 700)

In the trial in the District Court, petitioner never raised the issue of whether the aforementioned records were obtained by the Internal Revenue Service legally or illegally.

At the beginning of the trial, petitioner moved the District Court to subpoena Thomas Scanlon, which the Court refused to do. The Court of Appeals stated in its opinion that the petitioner should have subpoened Scanlon with the money he used to summons other witnesses.

During the trial, which lasted from October 18, 1960 to November 19, 1960, petitioner, who acted as his own counsel, took almost no exceptions to the admissibility of certain evidence and when he did object, he stated, "I except whatever you do"; (TT 266) petitioner took no exceptions nor raised objection to certain remarks of the District Court, such as "summarizing what the government has proved"; "And this is your excuse for not making." (TT 269)

REASONS FOR GRANTING THE WRIT

A. There was no substantial tax due.

1. The opinion of the United States Court of Appeals, dated August 10, 1961, at page 20 herein, states, "defendant also maintained that, even assuming the correctness of the Government's evidence of income received by him, he had sufficient allowable deductions to reduce his tax to an insignificant amount. However, in rebuttal, the government showed that various tax and interest payments claimed by the defendant had been made, according to the books or checks, by the corporations. In the reconstruction of tax due for 1952 and 1953 tax years, however, deductions for interest and tax payments shown by the evidence to be paid by defendant were allowed."

   The defendant contends that tax and interest payments made by the corporations for the benefit of the defendant of which corporations he was manager and a major stockholder may be claimed as a deduction on the stockholder's individual income tax return.

   If these tax and interest payments had been allowed, there would be no substantial tax due.

Government Tax Computation for 1952 was as follows:

Adjusted Gross Income	$15791.12
Less: Itemized deductions for for interest & taxes	1692.52
Adjusted net income	$14098.60
Less: Deductions for exemptions 4 @ $600 each	2500.00
Taxable income	$11698.60

Tax	$ 3669.41
Tax Paid	0.00

Petitioner's Tax Computation for 1952 was as follows:

Adjusted net income - as above		$14098.60
Less: Taxes and interest paid by corporations on its notes. The corporations were controlled and managed by petitioner and the notes endorsed by him		
Interest	$6864.93	
Taxes	3329.65	$10194.58
Adjusted net income		$ 3904.02
Less: Deduction for exemptions 5 @ $600 each		3000.00
Taxable income		$ 903.02
Tax		180.60
Tax Paid		143.10

The general rule is that a taxpayer is entitled to a deduction for interest paid on his debtedness even though payment is made through another. In Jergen, 17 TC 106, it was held that a taxpayer was entitled to deduct interest on his indebtedness where such interest was paid by a corporation that he controlled, and charged to his account. In Collier, 104 F (2d) 420, a controlling stockholder was entitled to deduct interest paid by the corporation and credited to him by the corporation. In Scruggs-Wandervoort-Barney, Inc., 7 TC 799, it was held that where a department store corporation, in order to protect its busi-

ness reputation, paid losses of depositors of a closed bank, payments were allowed as deductions; although the store and the bank were separate corporations in the eyes of the public, they were one business.

The petitioner was in complete financial and management control of the entities. His entire manner of handling the businesses was one of substance rather than form. He actually assumed the obligations of the corporation by his endorsements when it was apparent that the corporations did not have the funds to pay them. He treated these obligations as his own, and paid them as his own. In Greenbaum v. United States, 17F Supp. 83, it was held that where endorser was called on to pay notes, as taxpayer he was entitled to deduct losses sustained by reason of notes paid.

Interest is not deductible unless it is paid on an obligation of the taxpayer. As soon as demand was made on the defendant, it became his primary obligation. The payments came within the scope of the Internal Revenue Code of 1954, Sec. 161.

Government Tax Computation for 1953 was as follows:

Adjusted Gross Income	$9437.74
Less: Itemized deductions for interest & taxes	1005.71
Adjusted net income	$8432.03
Less: Deduction for exemptions 4 @ $600 each	2400.00
Taxable Income	6032.03
Tax Due	1526.89
Tax Paid	0.00

Petitioner's Tax Computation for 1953 was as follows:

Adjusted Net Income, as above		8432.03
Less: Interest and taxes paid by corporations controlled and managed by petitioner		
Interest	$3272.04	
Taxes	1439.92	4711.96
Adjusted Net Income		$3720.07
Less: Deductions for exemptions 5 @ $600 each		3000.00
Taxable Income		$ 720.07
Tax Due		144.01
Tax Paid		140.12

Government Tax Computation for 1954 was as follows:

Adjusted Gross Income	$6429.18
Less: Standard Deduction	500.00
Adjusted Net Income	$5929.18
Less: Deductions for exemptions 4 @ $600 each	2400.00
Taxable Income	$3929.18
Tax Due	736.42
Tax Paid	0.00

Petitioner's Tax Computation for 1954 was as follows:

Adjusted Gross Income - as above		$6429.18
Less: Interest and taxes paid by corporations controlled and managed by petitioner		
Interest	2769.14	
Taxes	5162.67	7931.81
Adjusted Net Income		0.00
Tax Due		0.00
Tax Paid		367.10

Government Tax Computation for 1955 was as follows:

Adjusted Gross Income	$8296.39
Less: Standard Deductions	500.00
Adjusted Net Income	$7796.39
Less: Deductions for exemptions 5 @ $600 each	3000.00
Taxable Income	$4796.39
Tax	1047.06
Tax Paid	213.00

Petitioner's Tax Computation for 1955 was as follows:

Adjusted Gross Income - as above		$8296.39
Less: Deductions		
Interest Paid	8.20	
Taxes Paid	2774.47	
Rent Paid	4500.00	7282.67
Adjusted Net Income		$1013.72
Less: Deductions for exemptions		3000.00
Net Taxable Income		0.00
Tax Due		0.00
Tax Paid		249.60

The petitioner's tax computations above are made without taking into account his capital loss, which would indicate further that he had no taxable income whatsoever.

2. Further, the "net worth" method of estimating income should have been applied when it was obvious that the defendant's assets were less at the end of the taxable period than at the beginning and that the decrease was due only to devaluation of the assets.

No allowance, consideration, or deduction for loss was given to defendant-taxpayer for the fact that on January 1, 1952, he owned a major number of shares in several corporations he was managing, and for which he had a substantial cost basis, and in April, 1954, the corporate assets were assigned to a trustee for the benefit of creditors. At this point, the defendant was wiped out financially and his shares were worthless. The difference between his cost and the end value of zero is a loss to which defendant was entitled as a tax loss and which loss was never allowed nor deducted, to its allowable extent, from his income in the computation of his tax. The total loss is about $200,000.

This loss, together with the tax and interest payment, would have made no tax due. The taxpayer is permitted to deduct other "probable allowable deductions" not shown on his return, United States v. Stayback, 212 F (2d) 313.

3. The moneys paid by the corporations to the defendant's estranged wife and to creditors of the defendant for personal expense should have been called "not income" by the Government, and should have been treated as a return of capital, so that his basis of cost would have been adjusted, to the extent of

the payments to determine the amount of loss at the time of the aforementioned assignment.

He authorized and caused the corporations to pay corporate funds to his wife and to his personal creditors.

B. In Glasser v. United States, 314 U.S. 60, the Court said, "It is not for us to weigh the evidence or to determine the credibility of the witnesses." The circumstances under which the petitioner filed his tax returns were extreme in that he felt he was losing so much money and that he knew he was being wiped out, yet he seemed to come within the purview of Holland v. United States 348 U.S. 121.

With this arrangement, whether rightly or wrongly, defendant believed he had the right to comingle funds as he did and apply losses of one business against another. He believed he was, for practical purposes, operating and managing one large enterprise instead of many small ones.

There were no false entries in the books and records, the records were adequate, no books and records needed to substantiate the defendant's tax returns had been destroyed, handling of cash was explainable, purchases had not been padded, there were no double sets of books.

In Rivera v. United States, 57 F 2d 816, and Spies v. United States, 210 F 2d 496, the Court held that the evidence must disclose the positive type of conduct on the defendant's part as necessary to the felony of that fraud.

The defendant did not willfully evade taxes owed by filing and causing to be filed false and fraudulent income tax returns.

In 1950 and 1951, the defendant acquired the majority stock in two corporations. These two corporations owed about $200,000 in overdue social security and withholding taxes incurred during prior management. In 1951, Thomas Scanlon, above mentioned, and the defendant, arranged and agreed that income and cash

from all of the corporation or any business managed by the defendent would be used in payment of the $200,000 above mentioned. In attempting to comply with this arrangement, all of the other businesses became so severely strained financially that in April 1954, the assignment for the benefit of creditors became necessary.

It was under this great pressure and the fact that defendant knew he was wiped out financially that he filed his tax returns. The returns were incorrect, but not false nor fraudulent. The returns for 1952 and 1953 were filed on March 15, 1954, one month before he knew he was to be wiped out financially.

Even though the determination of "willfullness" and "fraud" are generally questions of fact for the jury, petitioner contends that when it is so obvious that a person's mind is overwhelmed, it then becomes a matter of law. Here, the petitioner contends that he was so overwhelmed with his financial problems that it should have been obvious that he had no thought whatsoever about the technical preparation of his income tax returns — cheating on his tax return would be the last thing he would be thinking of.

C. The District Court should have allowed the motion for issuance of subpoena for Thomas Scanlon.

Thomas Scanlon recognized the pressure under which defendant was operating the business. It was Thomas Scanlon who could testify that the defendant was operating under an arrangement whereby the defendant was permitted to comingle funds of various entities so much so that it was defendant's belief he was managing one large business instead of several small businesses. This testimony goes to the essence of defendant's "intent" — which makes up defendant's attitude as to fraud when his tax returns were filed.

Defendant contends that the United States Court of Appeals was in error when it stated in its opinion at Page 21 herein, "there is no merit in defendant's contention that the District Court committed prejudicial error in refusing to subpoena Thomas Scanlon at gov-

ernment expense, since in the oral agreement before us defendant's counsel admitted that defendant had borrowed $200 from his sister to advance for costs and witness fees, and had made his choice of witnesses. If Scanlon's testimony were as important to his defense as defendant now says, he should have chosen to subpoena him in preference to several witnesses who did little to aid his cause, if, indeed, such a choice was necessary."

The defendant needed all his witnesses and was in no position to choose whom he should call. Scanlon was in the New York area. The fee to subpoena him alone would have used up all or a great part of the $200 he borrowed from his sister. This is a criminal case, and it was the government's duty to give him protection in the trial of his cause, if the protection was a matter of money only. According to the opinion of the Court of Appeals, it was a matter of money only that the motion was denied. Certainly a defendant's ability to protect himself does not depend upon how much money he has.

This reason for denying the motion the defendant contends is wrong.

D. When the District Court saw that the defendant lacked the skill and knowledge to handle his own defense adequately, to give him "wide latitude" in the presentation of his case was not giving him adequate judicial guidance or protection, but was further handicapping the defendant so that his constitutional right to a fair trial was denied.

Even though the defendant was a lawyer, he had not practiced law for twenty-four years and had had very limited trial experience. He was unaware of the rules of procedure and evidence, and in addition to his helplessness at the trial of an extremely complicated matter, he lacked the knowledge to have illegally obtained evidence suppressed.

The District Court should have ordered the trial stopped and insisted that the defendant obtain counsel to conduct or assist in the trial. (Gibbs v. Burke, 337 U.S. 773, 93 L. Ed. 1686, 69 S. Ct. 1247.

CONCLUSION

It is respectfully submitted that for the reasons stated hereinabove, the petition for writ of certiorari should be granted.

Respectfully submitted,

SOLOMON SANDLER,
63 Rogers Street,
Gloucester, Massachusetts
Attorney for Petitioner.

United States Court of Appeals

For the First District

No. 5792.

JOHN J. BURKE, JR.

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Solomon Sandler for appelant.

Harold Lavien, Assistant U. S. Attorney, with whom *Elliot L. Richardson*, United States Attorney, and *Thomas P. O'Connor*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT

August 10, 1961

Hartigan, Circuit Judge. Defendant-appellant, John J. Burke, Jr., was found guilty by a jury on four counts of an indictment charging him with willfully and knowingly attempting to evade and defeat a large part

[1] Counts One to Four alleged willful evasion of taxes owing for the calendar years 1952-1955 respectively. The statutes alleged to be violated were I.R.C. 1939 § 145 (b), 26 U.S.C. § 145 (b) (1952) as to Counts One and Two, and I.R.C. 1954 § 7201, 26 U.S.C. § 7201 (1958) as to Counts Three and Four.

of the income tax due and owing by him to the United States of America by filing false and fraudulent income tax returns.' The district court entered judgment on December 16, 1960 and imposed a fine of $2,500 and imprisonment for a period of four months on each count, said prison sentences and fines imposed on all counts to run concurrently.

Defendant makes three contentions of error in this appeal: (1) the district court erred in denying defendant's motion for acquittal at the close of the evidence; (2) the district court erred in denying defendant's motion for issuance at government expense of a subpoena for Thomas Scanlon; (3) the district court erred in permitting the trial to proceed when the evidence indicated that the Internal Revenue Service had taken the defendant's many records without service of a subpoena on him and without giving him a receipt for the records taken.

The case was tried on a specific items theory and only a short resume of the voluminous evidence in a trial consuming thirteen days is required to indicate that there is no merit in defendant's first contention of error.

In 1952 defendant was the sole proprietor of Curley Esso Station, and of an oil transportation business, Burke Oil Transport, a partner with William J. Brady in the operation of the Hesperus Diner; a substantial stockholder in Sherman B. Ruth, Inc., a ship chandlery; B & B Trawling, Inc., owner and operator of fishing boats; Cape Ann Machine Co., Inc., a repairer of boats, and owner or part owner of various fishing boats.

His income tax return for 1952 showed salary from Sherman B. Ruth, Inc., a profit from Curley Esso Station and a loss on the Hesperus Diner, resulting in no tax due. The Government put in evidence of fifty-one checks of $50 each received from Sherman B. Ruth, Inc. as commissions, fifty-two checks of $50 each received from Cape Ann Machine Co., Inc. as commis-

sions; fifty-two checks of $100 each received from B & B Trawling, Inc. as salary, a net profit of $2,632.87 from the operation of Burke Oil Transport, and a reportable long term capital gain from the sale of the oil transport tractor-trailer of $1,658.13 as well as $3,500 received from Sherman B. Ruth in the form of overpayments for groceries and meats. All of the above mentioned checks were either cashed or deposited to defendant's personal account.

Defendant's 1953 income tax return contained the same sources of income as his 1952 return and showed no tax due the United States. The Government presented evidence of seventeen checks of $50 each received by the defendant from Sherman B. Ruth, Inc. as commissions, and seventeen other checks of $50 each from Cape Ann Machine Co., Inc. as commissions, and eighteen checks of $100 each received from B & B Trawling Inc. as salary, bond interest of $172.01, fifty-one checks of $40 each made out to Eunice Burke, defendant's wife, and ultimately charged to Sherman B. Ruth, Inc., although she did not work for any of the companies, various payments made by Sherman B. Ruth, Inc. to defendant totalling $3,764.69, and other payments by Sherman B. Ruth, Inc. to creditors of defendant for personal expense, $2,166.07.

In his 1954 return, defendant reported income from the same sources as before plus salary from the City of Gloucester of $1,500. The return indicated that no tax was due the United States. The Government introduced evidence of payments by Sherman B. Ruth, Inc. of $5,074.18, consisting of three items: (1) direct payments to defendant, (2) support for defendant's wife and (3) payments to defendant's creditors.

In defendant's 1955 income tax return he reported the City of Gloucester salary of $1,500 and $2,892.50 from a source, "Dickern Marine Supply, Transportation of Oil," resulting in a tax of $188.00. The Government introduced evidence of ten checks of $65 each received from Sherman B. Ruth, Inc. as salary, nine payments of $40 each to Eunice Burke, an unreported

profit of $2,893.89 from the operation of the oil transportation business, based on computations since no records were kept by defendant.

The defendant, a member of the Massachusetts bar, represented himself at the trial and testified in his own behalf. His testimony and that of several other witnesses tended to show that the defendant had put various amounts of money into the several enterprises during 1952-1954, both monies supposedly paid to him, and his own savings, but neither the defendant nor the other witnesses were able to show entries in the books or check books to support these assertions. Defendant also maintained that, even assuming the correctness of the Government's evidence of income received by him, he had sufficient allowable deductions to reduce his total tax due to an insignificant amount. However, in rebuttal the Government showed that various tax and interest payments claimed by defendant had been made, according to the books or checks, by the corporations. In the reconstruction of tax due for the 1952 and 1953 tax years, however, deductions for interest and tax payments shown by the evidence to be paid by defendant were allowed. In each of the four years a substantial tax was shown by the Government's evidence to be due and owing to the United States by the defendant.

On the element of willfulness, the Government introduced evidence that in 1950 and 1951 defendant's tax returns had given as sources of income the meat transactions and oil transportation profits, as well as the Sherman B. Ruth, Inc. and Cape Ann Machine Co., Inc. commission payments and B & B Trawling, Inc. salary. Defendant had deficiency assessments made against him for the years 1947 and 1948 based on his failure to report receipts from the oil transportation business and the meat transactions. Defendant is a lawyer, although no longer practicing. In addition, he had employed an accountant to aid him in regard to the 1947-1948 asserted deficiencies and a complete bookkeeping system for defendant and his business interests had been set up.

The evidence summarized is certainly sufficient to warrant the submission of each of the counts to the jury. The district court was clearly correct in denying defendant's motion for acquittal.

There is no merit in defendant's contention that the district court committed prejudicial error in refusing to subpoena Thomas Scanlon at Government expense, since in the oral argument before us defendant's counsel admitted that defendant had borrowed $200 from his sister to advance for costs and witness fees and had made his choice of witnesses. If Scanlon's testimony were as important to his defense as defendant now says, he should have chosen to subpoena him in preference to several witnesses who did little to aid his cause, if, indeed, such a choice was necessary.

Defendant's third contention is that the district court should not have permitted the trial to proceed since the evidence indicated that the Internal Revenue Service had taken his records without serving a subpoena on him and without giving him a receipt. He complains particularly because the Government states that it does not have the records of the incorporated vessels, Florence and Lee and Hilda Garston, and he could not get these records for use in his defense. The record reveals adequate evidence to justify a conclusion by the district court that the records obtained by the Internal Revenue Service were in the possession of the assignee for the benefit of creditors and that no improper procedures were used by the Internal Revenue Service in taking the records. Indeed, the issue was never before the district court in the form now presented. Defendant sought the production of documents and records in the Government's possession and this was granted. Defendant further complained of the lack of the Florence and Lee, Inc. and Hilda Garston, Inc. records, but apparently never ascertained whether these records were still in the possession of the person who took over the enterprises as assignee. Defendant has not shown us that his rights were denied by the district court's permitting the trial to proceed.

We have carefully examined the entire record. We believe that the district judge should be commended for his patience and tact in the conduct of this trial. Indeed, the defendant concedes that he received fair treatment from the court and stated that the charge "was very fair." Defendant was allowed a very broad scope in the presentation of his defense and received a full and fair trial.

Judgment will be entered affirming the judgment of the district court.

United States Court of Appeals

For the First Circuit

No. 5792.

JOHN J. BURKE, JR.,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

JUDGMENT

August 10, 1961.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD,
Clerk.

By /s/ DANA H. GALLUP,
Chief Deputy Clerk.

(cc. Messrs. Sandler and Lavien.)

United States Court of Appeals

For the First Circuit

No. 5792.

JOHN J. BURKE, JR.,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

ORDER OF COURT.

September 7, 1961.

It is ordered that the petition for rehearing filed by appellant on August 23, 1961, be, and the same hereby is, denied.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

(cc. Messrs. Sandler and Garrity.)

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No. 471

In the Supreme Court of the United States

OCTOBER TERM, 1961

JOHN J. BURKE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LOUIS F. OBERDORFER,
Assistant Attorney General,
JOSEPH M. HOWARD,
K. WILLIAM O'CONNOR,
Attorneys,
Department of Justice,
Washington 25, D.C.

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Glasser v. *United States*, 315 U.S. 60 — 8

Johnson v. *United States*, 318 U.S. 189 — 8

Statutes:

Internal Revenue Code of 1939, Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145(b)) — 2

Internal Revenue Code of 1954, Sec. 7201 (26 U.S.C. 7201) — 2

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 471

JOHN J. BURKE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17–22) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1961 (Pet. App. 23), and a petition for rehearing was denied on September 7, 1961 (Pet App. 24). The petition for a writ of certiorari was filed on October 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the verdict.
2. Whether the district court erred in refusing to

subpoena a witness for petitioner at government expense.

3. Whether the petitioner, an attorney, was denied effective representation at trial by the failure of the district court to insist that he obtain counsel.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or im-

prisoned not more than 5 years, or both, together with the costs of prosecution.
(26 U.S.C. 7201.)

STATEMENT

On January 22, 1960, an indictment in four counts was returned against petitioner in the United States District Court for the District of Massachusetts, charging him with wilful attempted evasion of his income taxes for the years 1952 through 1955, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954. Petitioner's reported and correct taxable income and tax liability, as alleged in the indictment, are as follows (App. 1-3)[1]:

	Reported		Correct	
	Income	Tax	Income	Tax
1952	($1,978.75)	$0.	$15,791.12	$4,223.74
1953	(2,206.68)	0	9,446.34	1,701.72
1954	1,355.00	0	6,431.68	736.97
1955	4,892.80	188. 0	9,445.71	1,357.88

On November 9, 1960, after a jury trial lasting twelve days, petitioner was found guilty on all counts (R. 1156). On December 16, 1960, he was sentenced to imprisonment for four months and fined $2,500 (App. 47).

Petitioner is a graduate of Brown University and of Harvard Law School; he is a member of the

[1] References to appellant's appendix in the court of appeals will be designated "App." References to the government's appendix in the court of appeals will be designated "Gov. App." References to the transcript of the trial proceedings will be designated "R."

Massachusetts Bar (R. 899–902). He practiced law from 1934 to 1937, but thereafter engaged in the operation of fishing vessels and related businesses, several of which were incorporated (R. 764–766; Pet. 3–4). He chose to defend himself at the trial.

Although petitioner's income tax returns for the years concerned reported a certain amount of income from some of the businesses in which he was involved (R. 452–454), the government's proof at the trial showed substantial additional payments to petitioner, unreported in his returns, from entities which he either owned or controlled (R. 454–467). These payments resulted in corrected taxable income and corrected tax liabilities for the years involved substantially as alleged in the indictment (R. 467–469).

Petitioner admitted the receipt of the unreported payments (Pet. 7–11). He claimed at the trial that he was not required to report some of the payments because they represented return of capital, and that he had actually overstated his taxable income because he had failed to claim deductible expenditures made by his corporations for his benefit. He testified that he had poured large amounts of his personal funds into the corporations during the years involved, and that he felt he was entitled to credit for their deductible expenditures because of the amount of money he had put into them. (R. 757–761, 774–778, 794–796, 815–818, 825–828, 844–849.) But petitioner was unable to point to any evidence in the corporate books that the corporations had received personal funds from him (R. 904–908, 943–949, 955–957, 1041, 1062, 1069), and the books actually showed that he had

borrowed in excess of $86,000 from the corporations (R. 473, 1112). Furthermore, although petitioner insisted that he had $14,000 in cash at the beginning of 1952 which went into the corporations, there was evidence that he had invested this amount in the purchase of race horses (R. 794–796, 943–961, 1095–1103).

The jury was carefully instructed that, in order to convict petitioner, it must find that he had understated his taxable income, and that he had done so, not by mistake, but with full knowledge of the understatement (R. 1131–1138). The jury was also instructed at length on the law as to allowable deductions (R. 1140–1147).

ARGUMENT

Further review by this Court is unwarranted. The decision of the court of appeals is correct and no conflict of decisions or important questions of law are presented.

1. Petitioner's main argument (Pet. 2, 7–14) is that the evidence is insufficient to support the verdict, because the government failed to prove that there was a substantial amount of unreported tax and that petitioner had wilfully falsified his returns. Petitioner assumes (Pet. 7–12) that he himself paid corporate taxes and interest through money he supplied to the corporations (Pet. 9), and that he should therefore be entitled to deduct these payments on his personal return. The same assumption underlies his contention (Pet. 12–13) that corporate payments to petitioner's estranged wife and to his creditors should be treated as return of capital to him, and his further

contention (Pet. 13–14) that he believed he had the right to offset the losses of one business against another. But all these contentions were rebutted by the government's evidence, and the conviction shows that the jury must have rejected petitioner's version. The argument, therefore, raises essentially a question of fact which merits no further review by this Court.[2]

2. Petitioner contends (Pet. 2, 14–15) that he was prejudiced by the trial court's refusal to have the witness Thomas Scanlon subpoenaed at government expense. But petitioner made no point at the trial of the importance of Scanlon's testimony to his defense, and, as the court of appeals observed (Pet. App. 21), he could have subpoenaed the witness himself had he so desired.[3] Furthermore, it is difficult to perceive how Scanlon could have added much to petitioner's case. Petitioner's testimony was that Scanlon had suggested that all petitioner's various business entities be run as one, and their funds, commingled. But even if Scanlon had fully corroborated petitioner on this point, the essential question in the

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[2] There is obviously no merit to the argument (Pet. 12) that petitioner should have been allowed deductions on the deflated value of his corporate stock.

[3] The conclusion of the court of appeals is supported by evidence introduced at the hearing on petitioner's motion for a subpoena, which showed that he was making about $1,000 a month from his oil business at the time (see Gov. App. 40–49). Furthermore, the government actually did subpoena several witnesses chosen by petitioner, but Scanlon was not included in petitioner's request. See the statement in the Government's brief in the court of appeals, pp. 5–6, approved by the trial judge by order dated March 29, 1961.

case would have still remained whether petitioner funneled his own funds into the corporations in such a way that the corporate payments in his behalf constituted, not taxable income, but a return of capital. As to this issue, there is no suggestion that Scanlon's testimony would have been of any assistance to petitioner.

3. Petitioner raises (Pet. 3, 15), for the first time, the contention that the trial judge should have seen that he lacked the skill and knowledge to handle his own defense and should have therefore insisted that petitioner obtain counsel to represent him. Since the indictment was returned in January 1960, and the trial did not begin until October 1960, petitioner had ample time to prepare his case. Moreover, the numerous pretrial motions petitioner filed (App. 4–38) and his conduct of the pretrial hearing on March 7, 1960 (Gov. App. 36–52) were sufficient to convince the trial judge that he should not interfere with petitioner's insistance on acting as his own counsel. The petition gives no record references to support the allegation of helplessness and lack of skill. Furthermore, in view of the circumstances, he was granted very considerable leeway in presentation of his own testimony (R. 755–899, 1050–1069), which undoubtedly would not have been the case had he been represented by counsel. When a defendant—especially one who is a graduate of an accredited law school and a member of the bar—insists on representing himself and manifests competence to represent himself, a court is not required to force counsel upon him. See *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275,

279; cf. *Glasser* v. *United States*, 315 U.S. 60, 70; *Johnson* v. *United States*, 318 U.S. 189, 201.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
K. WILLIAM O'CONNOR,
Attorneys.

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